ORIGINAL

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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In the Matter of **AMERICAN SOCIETY OF TRAVEL AGENTS, INC.** **and** **JOSEPH L. GALLOWAY,** **Complainants** **v.** **UNITED AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., CONTINENTAL AIRLINES, INC., US AIRWAYS, INC., TRANS WORLD AIRLINES, INC., AMERICA WEST AIRLINES, INC., ALASKA AIRLINES, INC., AMERICAN TRANS AIR, HORIZON AIR INDUSTRIES, INC., MIDWEST EXPRESS, INC., AIR CANADA, KLM ROYAL DUTCH AIRLINES, TACA INTERNATIONAL AIRLINES, INC., and AIR FRANCE,** **Respondents**	**Docket OST-99-6410** -15

ANSWER OF
AIR CANADA

Communications with respect to this document should be sent to:

Geoffrey N. Pratt
Senior Counsel, Regulatory
and International Law
AIR CANADA
Law Branch 276, CP 14000
Saint-Laurent, Quebec H4Y 1 H4
CANADA

Anita M. Mosner
GKMG CONSULTING SERVICES INC.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5201

Representatives of
AIR CANADA

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I. INTRODUCTION

On October 25, 1999, the American Society of Travel Agents, Inc. and Joseph L. Galloway (herein collectively referred to as "ASTA") filed a Complaint at the Department of Transportation ("DOT" or "Department") under 49 U.S.C. § 41712 against Air Canada and several other US. and non-U.S. air carriers. The Complaint essentially alleged that the individual decisions of the above-named carriers to reduce travel agent commissions to 5% constituted an "unfair practice" or "unfair method of competition" that should be

enjoined by the Department. ASTA further claims that the caps were adopted by the airlines with "predatory intent," for the "purpose of eliminating travel agents as viable competitors." See ASTA Complaint at 7.

The ASTA Complaint is utterly meritless. ASTA is attempting to bootstrap a dispute between principal and agent into something more. As Air Canada will show below, there is no legal or factual basis for the Department's intervention in this matter. Air Canada respectfully urges the Department to dismiss the Complaint as contrary to settled legal precedent and erroneous as a matter of fact.

II. ADMISSIONS AND DENIALS

Under 14 C.F.R. § 302.207(b), parties filing answers to third-party complaints are to "admit or deny specifically and in detail each allegation of the complaint. . . " The ASTA Complaint, however, is not organized by numbered paragraphs to which Air Canada might respond with specific admissions or denials. Air Canada generally denies each and every claim that its decision to cap travel agent commissions was made for anything other than legitimate commercial reasons. Air Canada specifically denies any claims that its actions were intended to drive travel agents out of business, or to otherwise suppress competition.

As explained in detail below, Air Canada strongly disputes many of the "facts" alleged by ASTA, such as the contention that travel agents are an "obstacle" to its objectives, that the new commission structure is "noncompensatory," that travel agents will be forced out of business because of this new structure, that consumers will be harmed, or that travel agents are the only "neutral" source of information available to consumers. Air Canada also disputes the claim that obligations imposed by ARC and/or IATA upon

travel agents (referred to by ASTA as the "Cost Squeeze" on pages 1 l-l 9 of the ASTA Complaint) were wrongful in any way or motivated by anything other than commercial prudence or financial necessity. Air Canada specifically wishes to note that it does not require its agents to secure an ESRP if they are accepting bookings via the Internet, nor does Air Canada differentiate the commissions paid on 'Net based booking versus non-'Net based bookings.

Air Canada states the following affirmative defenses to the ASTA Complaint:

- The Department does not have the authority to regulate travel agent commissions as requested by ASTA.
- ASTA's Complaint fails to set forth a basis upon which enforcement action can be taken under 49 U.S.C. § 41712. Under settled agency law, agents are prohibited from competing against their principals. Any allegation that Air Canada is wrongfully attempting to prevent travel agencies from "competing" with it for the distribution of travel services is insufficient as a matter of law.
- The agreement between Air Canada and its travel agents expressly authorizes Air Canada to establish its own commission levels.

III. DISCUSSION

Travel agencies play an important role in Air Canada's overall sales strategy. Despite ASTA's claim that travel agents are an "obstacle" to Air Canada's objectives (see Complaint at IO), travel agencies are now and are likely to remain Air Canada's primary distribution channel. Air Canada's exploration of alternative distribution methods, such as the Internet, is intended to provide consumers with new and convenient service options, not to harm the travel agent community, In fact, Air Canada's active development of new Web-based travel products thus far has provided passengers with the option of having their tickets issued by their travel agents.

The airline business is fiercely competitive, and carriers continually are searching for ways to lower their costs, and offer the best price to the public. Air Canada matched the recent commission cuts made by other airlines in order to remain competitive with such carriers. Air Canada takes strong exception to the assertion that the cuts were motivated by anything other than a desire to compete on a level playing field, much less a desire to injure travel agents in any way.

A. The Complaint is at Odds With Settled Law

1. The Complaint Ignores the Letter and Spirit of the Deregulation Act

Congress passed the Airline Deregulation Act in order to take the government out of the business of setting airline rates, fares and charges. Under current aviation policy, the "variety and quality of, and . . . prices for, air transportation services" are to be established on the basis of competition. See, 49 U.S.C. § 40101 (a)(12)(B). Consistent with the Deregulation Act, DOT has held that an airline should enjoy "the same freedom to choose the channels and the terms for distributing its services that firms in other unregulated industries enjoy." Third Party Complaint of the Association of Retail Travel Agents Against IATA, Cathay Pacific, Aer Lingus and Icelandair, DOT 99-4-19 (emphasis added).

Despite this very clear statutory mandate, ASTA is asking the Department to intervene in the private contractual relationship between airlines and their agents, and force the carriers to rescind caps upon travel agent commissions imposed earlier this year. Such intervention would turn the principles of deregulation on their head. In Investigation of

Competitive Marketing of Air Transportation, Order 82-12-85, the CAB expressly acknowledged that the policies which formed the foundation of airline deregulation would compel the CAB not to interfere with airline commission structures. As the CAB there stated, "the distribution system that evolves should be determined by the marketplace." See Order 82-12-85 at 6.

Travel agents have filed numerous complaints with DOT arising out of disputes over the level of commissions they should be paid, or over airline enforcement of ticketing rules and restrictions. See Association of Retail Travel Agents v. American Airlines, Delta Airlines, Northwest Airlines, and United Airlines, Docket OST-97-2908, September 16, 1997 (request for enforcement proceeding and petition for rulemaking against "unfair" airline practices against travel agents); Petition of Association of Retail Travel Agents, Docket OST-98-9775-1, November 11, 1998 (emergency request for rulemaking which would enable agents to renegotiate CRS contracts when airlines reduce commissions); and United States Travel Agent Registry v. Delta, United, American and Continental, Dockets OST-1997-4776-1, 4785-1, 4786-1 and 4836-1 (request that DOT rescind commission cuts on international fares). DOT has taken action on none of these complaints. Consistent with its previous practice, DOT should take no action here, as doing so would squarely contravene the spirit and letter of the Deregulation Act.

2. Airlines and Travel Agents Are Not "Competitors"

ASTA attempts to sidestep the fact that Congress has taken the regulator out of the business of setting airline commissions by couching its Complaint in antitrust terms, and claiming that the airlines have "predatory intent" and are attempting to "eliminate travel agents as viable competitors." ASTA Complaint at 7. In addition to being absolutely false,

this argument is legally unsustainable. Travel agents are not and cannot be "competitors" of the airlines. As a matter of law, agents are prohibited against competing with their principals. DOT has dismissed actions brought by travel agents complaining of "unfair competition" on the part of their airline principals. See Pacific Travel International, Inc. v American Airlines, Inc., DOT Order 95-1-2. (DOT dismisses complaint brought by travel agent alleging "unfair competition" against it by American holding that travel agents are the airlines' agents and therefore are "obligated to obey all reasonable directions of [their] principal[s].")

Federal courts also have rejected such claims of unfair competition. See Illinois Corporate Travel v. American Airlines 889 F.2d 751 (7th Cir. 1989), cert. denied 495 U.S. 919 (1990), in which the Seventh Circuit held that certain requirements imposed by American upon its travel agents did not eliminate "competition" between American and its agents under the antitrust laws, on the grounds that airlines as a matter of law do not "compete" with their agents. 889 F.2d at 753. Therefore, the actions of an airline in capping the commission paid to its agents cannot constitute an "unfair method of competition."

3. ASTA is Estopped From Complaining About Travel Agent Compensation Levels

The ASTA Complaint fails to acknowledge, much less address, the fact that under the standard ARC Agent Reporting Agreement and pertinent airline travel agency handbooks agents have agreed to be compensated in accordance with the commission schedules as established by those carriers. Having expressly bound themselves to accept compensation for their services as determined by Air Canada and other carriers, the travel

agent community cannot now argue that the commissions so determined are invalid. As the court held in Illinois Corporate Travel, "if the travel business is a genuine agency relation then the principal is no less entitled to decide between commission and piece work rates than it is entitled to decide the net price for its product." Id. at 752.

B. The Complaint is Unsubstantiated and is Factually Incorrect

Stripped to its essence, the ASTA Complaint alleges that:

- The 5% domestic commission cap is "noncompensatory;"
- As a result of the cap, agents will be forced out of business;
- Travel agents are the only "neutral" source of fare information; and
- Without travel agents consumers will be deprived of critical information about their travel options and will suffer harm.

ASTA provides no factual substantiation for any of its claims. There is simply no evidence on the record that the cuts complained of are "noncompensatory," and that travel agents will indeed go out of business if the cuts are not rescinded. In fact, if the information and services provided by travel agents are indeed as valuable to consumers as ASTA claims it would follow that consumers would be willing to pay fees for the services provided by their travel agents. Several agencies already have begun to impose such fees, charging passengers not only for issuing airline tickets but also for providing specialized information about specific destinations.

The General Accounting Office ("GAO") very recently prepared a study on the effect on travel agencies of changes in the way tickets are sold. GAO cited a number of ways in which travel agents have responded to commission cuts short of going out of business.

For example, agents have begun to impose fees for their services, rely more heavily upon automation, consolidate with other agencies and expand their services into more profitable areas. See "Changes in How Airline Tickets Are Sold," GAO Report RCED-99-221, July 1999, at IO-I 1 ("GAO Study"). It is telling that ASTA fails utterly to cite this report.[1]

ASTA argues that travel agents are the only "neutral" source of travel information and attempts to portray the Internet as a sales medium used by the major airlines for nefarious purposes.[2] This characterization is absolutely incorrect. The Internet is, if anything, the very epitome of a neutral and unbiased source of travel information. With just a few clicks of a mouse, consumers can gather information about destinations served and fares charged by virtually every airline. They can seek such information directly from the airlines from online auction sites, and from specialized travel information providers. The recent GAO Study has found, contrary to ASTA's claims that airlines use the 'Net to harm consumers, that "consumers are . . . benefitting from deeply discounted last-minute fares

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[1] The GAO Study contains a great deal of data which is inconsistent with the ASTA Complaint. For example, the Study concludes that airlines have passed their savings from commission cuts on to consumers, although the amount of such savings is difficult to quantify. GAO Study at 11. The GAO Study also acknowledges that many of the "unfair" airline practices complained of by ASTA, such as the occasional differential enforcement of restrictions against back-to-back ticketing, are perfectly lawful. (In fact, the GAO Study emphasizes that airlines generally do hold themselves to such restrictions, as they have strong financial incentives to do so.) See GAO Study at 15. The GAO Study also discusses the settled legal precedent (see pages 5-6, infra) which holds that airline "'principals" do not "compete" with their travel agents. See GAO Study at 15-16.

[2] For example, ASTA refers to "the Internet, [a means] by which the airlines believed they could control directly the information provided to the public without meddlesome interference by travel agents telling a somewhat different and unbiased story." See ASTA Complaint at 10.

offered on airline websites that previously may not have been offered for sale." GAO Study at 13.

ASTA provides no evidence that the threatened demise of travel agents would necessarily deter new entry or harm new-entrant airlines. While some new entrants rely upon travel agents as their primary source of ticket distribution still others are choosing to distribute their product using the Internet or direct sales.[3] ASTA's assumption that, without travel agents, new entry would be thwarted is simply groundless.

IV. CONCLUSION

The ASTA Complaint reflects concern on the part of the travel agent community about shifting patterns in the distribution of air transport services. This shift, facilitated by technological advances, is being driven by competition. As the GAO Study shows, ASTA's membership has begun the process of adapting to these changes.

ASTA would have the Department insert itself into what essentially is a private dispute about the costs airlines should pay for distributing their "products." The Department has observed in similar circumstances that its "enforcement authority should be used to protect the public interest and not merely to resolve private grievances." See Third Party Complaint of Pacific Travel International, supra. While ASTA attempts to cloak itself in a pro-consumer mantle, ASTA has produced no evidence that the commission caps complained of will harm the consumer. In fact, there is ample precedent against such intervention. In 1996, the United States Travel Agent Registry complained to Assistant

[3] EasyJet, one of Europe's most popular (and successful) new-entrant airlines sells its tickets only by phone or via the 'Internet.

Secretary Hunnicutt that airlines were engaged in "unfair competition" when certain low fares they offered were made available only on the Internet. Rejecting that assertion, Mr. Hunnicutt replied:

> You seem to be asking us to restrict the marketing strategies chosen by airlines that may benefit the public in order to preserve the agencies' market share. We are unwilling to interfere with airline choices on distribution methods as long as the carriers neither violate antitrust law principles nor otherwise harm the public. The statute directs us to foster competition in the airline industry, and more efficient distribution methods should promote airline competition.

Letter from Charles A. Hunnicutt to Bruce Bishins, CEO of the United States Travel Agent Registry, dated September 27, 1996, at 3. Mr. Hunnicutt's arguments remain as true today as they were in 1996. The Department has repeatedly refused to intervene in carrier/agent disputes, and should do the same here.

WHEREFORE, Air Canada respectfully urges that the Complaint filed by the American Society of Travel Agents and Joseph L. Galloway be dismissed.

Respectfully submitted,

Anita M. Mosner
GKMG CONSULTING SERVICES, INC.
Canal Square
1054 Thirty-first Street, N.W.
Washington D.C. 20007
(202) 342-5201

Representatives of
AIR CANADA

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 1999, I served a copy of the foregoing Answer of Air Canada on the following individuals by first class mail, postage prepaid.

Belen Sangria

Belen Sangria

Michael F. Goldman
Robert P. Silverberg
Silverberg, Goldman & Bikoff
1101 - 30th Street, N.W.
Suite 120
Washington, D.C. 20007

Marshall Sinick
Robert Papkin
James V. Dick
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington D.C. 20004

John E. Gillick
Winthrop, Stimson, Putnam & Roberts
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036

Carl B. Nelson Jr.
Associate General Counsel
American Airlines, Inc.
1101 - 17th Street, N.W.
Suite 600
Washington D.C. 20036

J. C. Buehler
Buehler Atkins Associates
Box 40924
Indianapolis, IN 46240-0924

Brian T. Hunt
General Counsel
William G. Doherty
American Trans Air, Inc.
P. O. Box 51609
Indianapolis International Airport
Indianapolis, IN 46251

R. Bruce Keiner
Crowell & Moring, L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2595

Robert E. Cohn
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Paul V. Mifsud
Vice President, Government
& Legal Affairs - USA
KLM Royal Dutch Airlines
2501 M Street, N.W.
Washington D.C. 20037

Elliott M. Seiden
Vice President, Law &
Government Affairs
David G. Mishkin
Vice President, International
& Regulatory Affairs
Northwest Airlines, Inc.
901 - 15th Street, N.W.
Suite 310
Washington D.C. 20005

Kathleen A. Soled
Senior Vice President & General Counsel
Trans World Airlines Inc.
One City Centre, 18th Floor
515 N. 6th Street
St. Louis, MO 63101

Jeffrey A. Manley
Kirkland & Ellis
655 - 15th Street, N.W.
Washington D.C. 20005

Lawrence M. Nagin
Executive Vice President,
Corporate Affairs & General Counsel
US Airways, Inc.
Crystal Park Four
2345 Crystal Drive
Arlington, VA 22227

Rosalind A. Knapp
Deputy General Counsel
Office of the General Counsel
Department of Transportation
Nassif Building, Room 10428
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Samuel Podberesky
Assistant General Counsel
Aviation Enforcement and Proceedings
Office of the General Counsel
Department of Transportation
Nassif Building, C-70, Room 4116
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Paul M. Ruden
Senior Vice President
Burton J. Rubin
General Counsel
Legal & Industry Affairs
American Society of Travel Agents Inc.
1101 King Street
Alexandria, VA 22314